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BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte 582 (Sub-No. 1)

PUBLIC VIEWS ON MAJOR RAIL CONSOLIDATIONS

REPLY COMMENTS

ON THE

NOTICE OF PROPOSED RULEMAKING

submitted by

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

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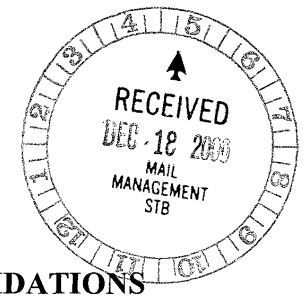

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The National Industrial Transportation League ("League") respectfully submits these Reply Comments in response to the Notice of Proposed Rulemaking ("NPR") of the Surface Transportation Board ("STB" or "Board") issued on October 3, 2000. On November 17, 2000, the League submitted extensive comments in this proceeding, which discussed a variety of issues presented by the Board's proposal. Numerous other parties also submitted comments, including the U.S. Department of Transportation, the U.S. Department of Agriculture, other shipper organizations, individual shippers, ports, state and local public bodies, Class I rail carriers, other smaller rail carriers, organizations of large and small rail carriers, labor interests, and other parties.

In its November 17 Comments, the League applauded the Board's determination to revise its rail merger policies in order to reflect the nature and needs of the nation's rail system since the Board last considered changes to its merger rules more than two decades

ago. NITL Comments, pp. 2-3. The League agreed with the two fundamental premises of the Board's NPR, first, that a significant overhaul of the agency's rail merger policies is clearly appropriate, and second, that the Board should revise its policies with an eye toward affirmatively "enhancing" competition in future rail consolidation proceedings, rather than simply attempting to "preserve" competition. NITL Comments, pp. 5-10.

However, in its Comments the League also suggested that the Board's proposed rules should be modified. First, the League asserted that the Board's proposed rules were vague or unclear in a variety of areas, and suggested that the rules should be significantly revised to provide both railroads and shippers with much greater specificity as to how and what competition will be enhanced, and what will be required, in future rail merger applications. The League provided the Board with specific language to address those problems. NITL Comments, pp. 10-14. Second, the League believed that the scope of the Board's rulemaking would create a serious disparity between the competitive conditions facing merging as compared to non-merging carriers, to the detriment of both merging carriers and the shipping public. Thus, the League asked the Board to put into place procedures that would work to insure greater rail-to-rail competition for both merging and non-merging carriers. In its Comments, the League set forth suggestions for accomplishing this "level competitive playing field" between merging and non-merging carriers, to the benefit of shippers and carriers alike. NITL Comments, pp. 15-18. Finally, the League presented a number of suggestions in other areas, including the definition and treatment of major gateways; the content of service assurance plans; the treatment of the acquisition premium in rail mergers; proposals for post-merger operational monitoring; trans-national issues; and downstream and crossover effects. NITL Comments, pp. 18-32.

In these Reply Comments, the League first discusses how many parties to this proceeding supported, in their Comments to the Board, the thrust of the League's analyses and the direction of the League's suggestions for improving the proposed rules. Second, the League' Reply Comments discuss the comments submitted by the Association of American Railroads ("AAR") and many of the nation's Class I rail carriers, and shows that the criticisms leveled by those parties at the Board's rules are not supported by the law or by sound public policy.

I. MANY PARTIES TO THIS PROCEEDING SUPPORT THE THRUST OF THE LEAGUE'S ANALYSES AND THE DIRECTION OF THE LEAGUE'S SUGGESTIONS

There were a number common themes contained in the comments submitted by the numerous and varied parties on November 17. A fair examination of these comments reveals that, with the exception of the comments submitted by the AAR and a number of the nation's Class I railroads, many of these submittals supported the thrust of the League's analyses and the direction of the League's suggestions to the Board for improvements to the Board's proposed regulations.

A. Many Commenters Agreed that There Has Been a Loss of Rail-To-Rail Competition As a Result of Past Mergers and That There Is A Need for Enhanced Competition

In its Comments, the League noted that past mergers had in fact resulted, and that future mergers would certainly result, in the loss of important forms of competition between the nation's railroads. NITL Comments, pp. 5-8. In particular, the League noted that past mergers had foreclosed competitive gateways – a form of competition the League called "segment competition" – and had also reduced the amount of leverage provided by geographic competition. *Id.* Thus, the League strongly agreed with the statement in the

Board's proposed rules that future mergers would likely result in anticompetitive effects that are increasingly difficult to remedy directly or proportionately. NPR, p. 12.

Many other commenters agreed with the League's analysis on this point. For example, the NGFA[1] stated that "what has really been eliminated by rail mergers, and by the last few in particular, has been competition." NGFA Comments, p. 2. Similarly, PPL Generation LLC ("PPL") noted that "[s]ince 1980, the level of intramodal competition faced by the major railroads has declined precipitously." PPL Comments, p. 2. Many other commenters presented similar facts. See Comments of Ag Processing Inc., p. 3; Ameren Services Company, p. 2; Committee to Improve American Coal Transportation, pp. 6-10; Alliance for Rail Competition, p. 1; U.S. Department of Agriculture, pp. 5-6; Subscribing Coal Shippers, pp. 9-10; The Fertilizer Institute and The Canadian Fertilizer Institute ("TFI/CFI"), p. 5; and the United States Department of Agriculture, pp. 5-6. In this connection, the League would particularly note the Comments of Bunge Corporation, which specifically described the dramatic reduction in segment competition that it experienced, as a result of the strong tendency of merged carriers to foreclose competitive routes in order to force shippers to hold traffic on their lines. Comments of Bunge Corporation, pp. 3-4. This tendency was also noted by other commenters. See, NGFA Comments, p. 7; Comments of IMC Global, Inc., p. 3.

As a result of the foreclosure of competition experienced as a result of past mergers and feared as a result of future mergers, many commenters agreed strongly that the Board's call for a "paradigm shift" in the direction of "enhanced competition" was necessary and indeed overdue. These included the comments of Ag Processing Inc., p. 2; the American

[1] The League will utilize the abbreviations of organizations set forth in the Appendix to the Board's NPR in this proceeding.

Forest Resource Council, p. 2; Ameren Services Company, p. 2; Committee to Improve American Coal Transportation, p. 10; the American Chemistry Council and the American Plastics Council ("ACC/APC"), p. 2; Consumers United for Rail Equity ("CURE"), p. 9; Enron Corporation, p. 1; the House Transportation Committee of the Commonwealth of Pennsylvania, p. 1; the Ohio Rail Development Commission, p. 2; the Oklahoma Department of Transportation, pp. 2-3; New York City Economic Development Corporation, p. 3; the North Dakota Public Service Commission, et al. p. 2; the Port of Houston Authority, p. 5; PPG Industries, Inc., p. 1; the State of New York, p. 6; the U.S. Department of Transportation ("US DOT"), p. 1, 3; and Weyerhauser Company, p. 3. Thus, the Board can be confident that its policy shift in the direction of "enhanced competition" enjoys broad support among parties intimately interested in the health and operation of the nation's rail system.

B. A Very Large Proportion of Commenters Agreed That The Board's Proposed Rules Are Too Vague and Need to Be Made Much More Specific and Definite

In its Comments, the League indicated that the Board should make its rules substantially more specific, since the proposed rules were so vague as to provide neither shippers nor carriers with clear notice of what is required, and what will be expected, in future mergers. NITL Comments, pp. 10-14. The League noted that., although the Board was acting at the level of broad policy and therefore needed to provide for a certain amount of flexibility in the rules, the proposed degree of flexibility was far too great. *Id.*

The League's review of the comments filed with the Board reveals clearly that this criticism of the proposed rules – that they are far too vague – was probably the single most common complaint leveled by commenters of all types. The consensus of most commenters, in other words, was that the Board's proposed rules needed specificity and "teeth." For

example, US DOT noted that "the NPRM offers little guidance as to what types of proposals would meet the Board's requirements, and how extensive such measures would have to be." DOT Comments, pp. 3-4. The United States Department of Agriculture ("US DOA") had the same complaint. US DOA Comments, p. 13. The sentiments of these federal agencies were echoed by other public bodies, including the Kansas Department of Transportation and the Kansas Corporation Commission, p. 3; the California Public Utilities Commission, p. 2; the North Dakota Public Service Commission, et al, p. 6 ("the Board should "provide details that will help minimize the need for further interpretive action by the Board or the Courts"); the Oklahoma Department of Transportation, pp. 3, 5-6; and the Wheat, Barley and Grain Commissions of various states, p. 2.

Many trade organizations echoed the criticism voiced by the League that the Board's proposed rules lacked specificity and detail. For example, the American Farm Bureau Federation ("AFBF") noted that the Board needs to add "meaningful, objective standards on which the Board will evaluate . . . merger applications." AFBF Comments, p. 2. NGFA called for "explanatory guidelines." NGFA Comments, p. 6. See also, comments of TFI/CFE, pp. 6-8; the Edison Electric Institute, p. 5; the Alliance for Rail Competition, p. 1; ACC/APC (the rules "do not set any objective standards for evaluating mergers"); the American Forest Resource Council, p. 2; and the Transportation Intermediaries Association, p. 1.

Many shippers and other users of the transportation system also noted that the proposed rules were far too vague. PPL Industries, LLC ("PPL") had a particularly telling comment in this regard. It noted that, unlike most rules that will have numerous applications over their life, during which an agency can gradually refine the application of the rules as

new situations arise and cases are brought to it for decision, any new major rail merger rules will have an extremely limited application. Given the fact that there are only a handful of Class I railroads remaining, it is very possible that there will be only two, or at the most three, proceedings to which the new regulations will apply. It is also very possible that, given the competitive realities of rail mergers, these two or three applications could be processed at virtually the same time. PPL Comments, pp. 9-10. Thus, noted PPL, it is very possible that the Board would "have only one chance to clarify its regulations by applying them in a major merger. Thus, the Board's entire constituency will be left in the dark . . ." as to what the rules mean, if they are left as vague as they currently are. *Id.*

Among the many other shipper commenters on this point, IMC Global Inc. stated at page 1 of its submission that the NPR is "exceedingly vague and lacking in accountability." PPG Industries (PPG") noted that the proposed rules are "too general in nature and fall short by failing to outline specific requirements in key areas." PPG Comments, p. 1. Other shippers voicing similar complaints about the vagueness and generality of the proposed rules include Ag Processing Inc., p. 2; BASF Corporation, p. 14; Bunge Corporation, p. 4; the Committee to Improve American Coal Transportation, p. 10; Enron Corporation, p. 1; the Greater Houston Partnership, p. 3; the Procter and Gamble Company, pp. 1, 3; and Weyerhauser Company, p. 8.

Indeed, on this point, it is important to note that smaller rail carriers and their representatives also agreed that the Board's proposed rules need to be made substantially more specific. The American Short Line and Regional and Regional Railroad Association's ("ASLRRA") comments were particularly trenchant:

> In ASLRRA's view, the proposed rules are not specific enough about what will be required of applicants in future Class I mergers. There is

> too much leeway left for the applicants, and not enough precision about what will be required. The Board paints an accurate picture of the issues and problems that confront the railroad industry as it faces the possibility of further major consolidations, but the Board's proposed rules do not go far enough in specifying how these problems should be addressed. ASLRRA urges the Board to put "teeth" in the rules by adding specific minimum conditions that will be required to enhance competition and protect essential services.

ASLRRA Comments, p. 2. Similarly, Farmrail System, Inc. a substantial regional rail carrier, noted that "too much is left to the discretion of the applicants, without any specifics for either judging an application or guiding short lines as to what they should expect." Farmrail Comments, p. 4.

Indeed, it is important to note that even the Association of American Railroads ("AAR") and certain of the major Class I rail carriers – whose comments are, as discussed further below, otherwise hostile to the main thrust of the Board's proposed rules – also agree that the Board's rules need to be more specific. For example, the AAR's comments noted that "[t]he Board's merger rules should be sufficiently clear to give potential merger applicants and other interested parties guidance as to what showing will be required to satisfy the public interest standard." AAR Comments, p. 4. Similarly, the Burlington Northern & Santa Fe Railway Company ("BNSF") calls the Board's proposal "unacceptably vague." BNSF Comments, p. 41. The Comments of the Kansas City Southern Railway Company ("KCS") similarly state that

> The proposed rules' general wording does not provide enough clarity and specificity. Markets work best when the rules are clear and concise and the "regulatory costs" can be assessed accurately in the market place. Market participants cannot make such a judgment under the proposed rules. Indeed, merging parties likely will not be able to determine with any certainty how these rules will impact the conditioning of rail mergers until the Board has processed several transactions under the new rules.

KCS comments, p. 5.

The League agrees with these principles, and urges the Board to define and specify the contours of its rules much more clearly than it has in its proposal.

C. Many Commenters Agreed That the Board's Proposed Rules Need To Specify That "Enhanced Competition" Should Mean Enhanced Rail to Rail Competition, and That Where A Specific Loss of Rail to Rail Competition Can Be Identified, That Loss of Competition Should Be Remedied

The League's Comments noted that, though the Board's proposed rules specify in a number of places that merger applications must include provisions for "enhanced competition," they never clearly specify that such "enhanced competition" must include provisions for enhanced rail-to-rail competition. NITL Comments, p. 11. The League suggested a number of places in the Board's proposed rules where the rules should be clarified to specify that this "enhanced competition" must include forms of enhanced rail-to-rail competition. NITL Comments, pp. 11-12.

In this connection, the League would note that the KCS, a smaller Class I rail carrier, also indicated that the agency's proposed policy statement is too general with respect to its focus on rail-to-rail competition, and that the Board should make clear that the "proper focus" of the agency's proposed rules "should be on remediating the adverse effects resulting from any reduction in intramodal competition." KCS Comments, p. 10. KCS noted that the agency's proposed policy statement "diverges" into a discussion of the nation's overall transportation infrastructure rather than focusing clearly on rail-to-rail competition, and indicates that the Board should not "allow itself to be distracted by issues of intermodal competition, either as an alternate to or as a substitute for intramodal rail competition . . ." KCS Comments, p. 10. The League agrees with KCS insofar as it states that the Board's rules should be clarified to focus on the potential loss of rail-to-rail competition, and thus the

League believes that the proposed rules should more clearly focus on "enhancing" rail to rail competition.

A substantial number of other commenters likewise recommended that the Board's proposed rules needed to be modified in order to focus on rail-to-rail competition. Many of these commenters, like the League, suggested various forms of rail-to-rail competition that should be specified in the rules. See Comments of Ameren Services Company, p. 3 (elimination of paper barriers); ACC/APC, p. 6 (bottleneck rates); Canadian Pulp & Paper Association, pp. 2-3; Committee to Improve American Coal Transportation, p. 11; IMC Global Inc., p. 1; NGFA, p. 4; PPL, pp. 15-16 (elimination of paper barriers); State of New York, pp. 8-9 and 15-16 (rebuttable presumption that paper barriers should be removed); Subscribing Coal Shippers, p. 13; US DOT, p. 4 (reciprocal switching in terminal areas).

The League also recommended to the Board that the agency should revise the wording of the fourth sentence of proposed Section 1180.1(a), in order to clarify what appears to be an unintended ambiguity in the proposed rules. NITL Comments, p. 12. The League noted that the wording could be read to suggest that the Board might favor consolidations that reduce railroad and other transportation alternatives as long as there are substantial public benefits. *Id.* Presumably, under such a reading, the Board might permit reductions in competition in one location, as long as there was enhanced competition somewhere else. But the League argued that such "offsets" should not be permissible when specific reductions in competition can be identified. In those cases, the League argued that those specifically-identified reductions in competition should be cured before the proposed merger is approved. *Id.*

A number of other commenters supported the thrust of the League comments, similarly recommending that "offsets" in one location should not be permitted to compensate for specifically-identified reductions in competition. The comments of ACC/APC, pp. 12-13; BASF Corporation, p. 13; PPL, p. 18; Procter & Gamble Co., p. 4; the State of New York, p. 8; and US DOT, p. 4, among others, all urged the Board to cure specifically-identified losses in competition as part of its decisionmaking process in reviewing proposed rail mergers.

D. Many Commenters Agreed That the Board Should Act More Broadly Than On Two Merging Carriers To Provide for Increased Rail to Rail Competition

In its Comments, the League noted its concern that, by focusing purely on merger policy to accomplish its objective of "enhanced competition," the agency was creating an "unlevel playing field" between merging and non-merging carriers, to the detriment of the merging carriers and the shippers of the non-merging carriers. The League asked the Board to act more broadly, by using its statutory authority under 49 U.S.C. §11102(a) and (c), to provide for enhanced competition through reciprocal switching and terminal trackage rights. NITL Comments, pp. 16-18.

Numerous other commenters noted the need for the Board to act more broadly than it has proposed, to provide for enhanced competition not just for merging carriers, but for non-merging carriers as well. For example, the Greater Houston Partnership urged the Board to provide broadly for competitive terminal access by all railroads serving a terminal area and all shippers located within a predetermined distance from a railroad interchange point. Greater Houston Partnership, p. 3. A similar suggestion was made by the Port of Pascagoula, Comments, p. 9, and Weyerhauser Company, pp. 4-5. IMC Global noted that if more liberal competitive access is to be provided as a condition to a rail merger, such competition should

also be provided in a non-merger setting, so that there is no unfair competitive advantage. IMC Global, p. 6. A similar course of action was urged by TFI/CFI, pp. 9-10. The comments of Consumers United for Rail Equity ("CURE"), at pp. 3-5 and the Edison Electric Institute, pp. 7-9, both urged the agency to provide broadly for increased competition. Finally, US DOT's comments were consistent with the League's view that a focus on merging carriers alone is not adequate, and that the Board should expand its consideration to encompass competitive access more broadly:

> The Board's efforts to address bottlenecks and enhanced access in this proceeding will help shippers affected by individual transactions. Unfortunately, other shippers will not benefit, and if there are no other major mergers, no access or bottleneck relief for any shippers will be forthcoming. It is thus clear that these questions exist independently of consolidations. DOT therefore continues to hold the view that the access question should be the subject of a separate, industry-wide, rulemaking.

Comments of US DOT, p. 6. Indeed, comments by BNSF also indicate that, by focusing purely on the merging carriers to enhance competition, "the merged railroads would be placed at a significant competitive disadvantage." BNSF Comments, p. 39. BNSF suggests that any structural changes be imposed "on a uniform basis." *Id.* Similarly, the Wisconsin Central noted the problems that could accrue if the Board approved enhancements of competition on merging carriers, without an opportunity for the merging carriers to compete for new business elsewhere. Comments of Wisconsin Central System, p. 3.

E. The League's View, That the Board Needs to Preserve Existing Gateways Both Physically and Economically, Was Substantiated By the Views of Many Other Parties to this Proceeding

At pages 18-20 of its Comments, the League applauded the Board's initial determination that merging carriers must be required to preserve existing gateways, but urged the Board to better and more broadly define what it meant by the term "major gateway," and

in particular, to insure that interchanges or gateways remain open both physically and economically.

The League's views were substantiated by the views of numerous other parties. These included, among others, the ACC/APC, p. 2; the Alliance for Rail Competition, p. 2; Ag Processing Inc., p. 5; Bunge Corporation, pp. 5-6; the Edison Electric Institute ("EEI"), pp. 9-10; NGFA, pp. 6-8; the North Dakota Public Service Commission, p. 3, as well as US DOT and US DOA. US DOT Comments, p. 5; US DOA Comments, p. 16.

F. Many Commenters Echoed the League's View that the Board's Proposal for A "Service Assurance Plan" Should Be Modified To Provide for Compensation In the Event of Service Failures

In its Comments, the League supported the Board's proposal for a "service assurance plan," but indicated that a service assurance plan should include provisions for the compensation of shippers in the event that promised service levels degrade from those experienced prior to the merger. NITL Comments, pp. 20-21. In addition, the League also indicated that the Board should impose, as a condition of any merger, that a service assurance plan should also include a provision for expedited arbitration of disputes over compensation for rail service failures as a result of a consolidation transaction, for a reasonable time after a consolidation is implemented. *Id.*, pp. 21-22.

Many commenters echoed the League's requests. Indeed, a fair analysis of the comments filed suggests that the need for compensation for service failures was perhaps the second most common suggestion regarding the Board's proposed rules (the need for greater specificity being the first). The need for compensation for service failures was suggested by

federal agencies,[2] by state governmental bodies,[3] by shipper trade organizations,[4] individual shippers,[5] and shortline carriers.[6]

In addition, many parties suggested, as did the League, that provisions for compensation for service failures should also be accompanied by procedures to adjudicate such claims promptly, often through expedited, mandatory arbitration. Among others, these included the comments of the Edison Electric Institute, pp. 11-12; TFI/CFI, p. 9; the Transportation Intermediaries Association ("TIA"), p. 3; Weyerhauser Company, p. 6; NGFA, p. 13; the Ohio Rail Development Commission, p. 7; and Twin Modal, Inc. p. 2. Clearly, the Board should revise its proposed rules to address these broad service concerns of the users of the rail transportation system.

G. Numerous Commenters Agreed That the Board Needs to Revise Its Treatment of Merger Acquistion Premiums

At pages 26-27 of its Comments, the League urged the Board to revise its proposed rules to include a prohibition against including any acquisition premium in determining revenue adequacy and reasonable rates, and that the Board should examine more closely than it has in past mergers the financial burdens that applicant carriers assume in a proposed transaction.

A number of other parties also echoed the League's concerns. For example, ACC/APC noted that "[c]aptive shippers have borne the financial burden of failed mergers for too long. The Board must take a hard look at the recovery of acquisition premiums in any

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2 US DOT Comments, p. 9; US DOA Comments, pp. 18-19.

3 Comments of the Oklahoma Department of Transportation, p. 11; the Ohio Rail Development Commission, p. 3; California Public Utilities Commission, p. 5; North Dakota Public Service Commission, et al, p. 2.

4 Comments of Edison Electric Institute, p. 9; NGFA, pp. 11-12; TFI/CFI, p. 9; Greater Houston Partnership, p. 4; U.S. Clay Producers Traffic Association, p. 4.

5 IMC Global Inc., p. 4; The Procter & Gamble Company, pp. 6, 7; Committee to Improve American Coal Transportation, p. 12; Weyerhauser Company, p. 7; Subscribing Coal Shippers, pp. 12, 20.

future mergers." ACC/APC Comments, p. 9. Both IMC Global Inc. (Comments at p. 2) and PPL (Comments at p.p. 13-14) noted that eastern carriers are initiating programs to increase rates, and urged the Board to revise its policies regarding acquisition premiums. Similar concerns were voiced by such diverse parties as US DOA (Comments at p. 17), the Edison Electric Institute, p. 11, and others.

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From all of the above, it is clear that the thrust of the League's Comments submitted was completely consistent with the direction of comments submitted by a large number of other parties in this proceeding. The League respectfully urges the Board to revise its proposals to take into account the suggestions set forth by the League on November 17th.

II. COMMENTS SUBMITTED BY THE ASSOCIATION OF AMERICAN RAILROADS AND MAJOR CLASS I CARRIERS, WHICH ARE COMPLETELY HOSTILE TO THE THRUST OF THE BOARD'S PROPOSAL, ARE UNSOUND AS A MATTER OF LAW AND POLICY

In sharp contrast to the views of virtually every other party to this proceeding, the comments submitted by the AAR and the four major domestic[7] and the two major foreign[8] rail carriers are utterly at odds with the central premise of the Board's new proposal, namely, that there should be a "paradigm shift" in favor of enhancing, rather than simply preserving, competition. The carriers' opposition takes many forms, from a claim that such a proposal is inconsistent with the Board's governing statute, through arguments that there is no basis for what railway interests call "presumptions" that mergers will produce generalized competitive harms or transitional service problems; or that future mergers will tend to produce fewer

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6 Farmrail Systems, Inc., p. 9; ASLRRA, p. 8.

7 BNSF, the Union Pacific Corporation and Union Pacific Railroad Company ("UP"), the Norfolk Southern Corporation and Norfolk Southern Railway Company ("NS") and CSX Corporation and CSX Transportation, Inc. ("CSX).

8 Canadian National Railway Company ("CN") and Canadian Pacific Railroad Company ("CP").

efficiencies than mergers have in the past; or that the Board's proposal will allegedly permit shippers to demand what one carrier calls "regulatory blackmail" (BNSF Comments, p. 42) and to advance what another carrier terms "concocted complaints" (CSX Comments, p. 29) to obtain pro-competitive benefits of a proposed merger.[9] In addition, these railway parties are also generally hostile to other major aspects of the Board's proposal, and seek, for example, to dilute a mere statement of good intentions, the Board's proposed requirements for service assurance plans.

Each of the criticisms leveled by these railway parties is wrong. Instead of reversing course and eliminating the requirement for "enhanced competition," the Board should, as the League and many other parties have suggested, more carefully define and specify what will be required by its proposal. The Board's proposals are fully consistent with its governing statute. The record in this proceeding (at both the ANPR and the NPR levels), as well as the Board's experience in past mergers, provides abundant support for the proposed rules. Moreover, the need to "enhance" competition is sound as a matter of regulatory policy, as evidenced by the strong support for the thrust of those rules not only by many kinds of users of the rail transportation system, but also by other federal agencies concerned with rail policy, particularly the Department of Transportation. Finally, the Board should not, as these Class I railroad parties have suggested, dilute the its proposals for service assurance plans, but should rather require, as the League and many other parties have suggested, enforceable penalties for merging carriers' service failures, in order to compensate shippers for costs that would not have been borne but for the carriers' own actions.

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[9] The League is extremely disappointed that carriers are apparently impugning in advance the integrity of parties that seek pro-competitive conditions in a merger to remedy what these parties see as the anti-competitive effects of a proposed transaction.

A. The Board's Proposal to Enhance Competition is Fully Consistent With Its Governing Statute.

The Comments of the AAR appear to suggest, and the comments of several of the major Class I carriers argue, that the Board is without statutory authority to adopt a policy that would provide for "enhancing" competition. See, AAR Comments, pp. 18-19; BNSF Comments, pp. 27-32; CP Comments, pp. 10-12; CSX Comments, p. 44.

These arguments, which suggest that Congress, in enacting ICCTA, was somehow enshrining the agency's merger policy as of 1995, are clearly wrong. The fact of the matter is that the statutory standard – "consistent with the public interest" – is extremely, and purposefully, broad. 49 U.S.C. §11324(c). Under Section 11324(b), while the Board must consider various factors such as the adequacy of transportation to the public, total fixed charges, the effect of a proposed merger on carrier employees, etc., it is also very clear that these considerations are simply minimum analyses that the Board must undertake. The statute does not prohibit the Board from taking into account other factors that might, in its sound discretion, enter into the public interest equation, and the Board can clearly consider the need for "enhanced competition" as one of these.

The statutory argument set forth by the AAR at pp. 18-19 of its Comments, that the Board must be a purely passive player in approving or disapproving mergers, and cannot, through the use of its policymaking authority, influence the shape of future rail consolidation transactions, finds no support in the statute: indeed, the AAR does not cite a single provision of the statute that would support its contentions.

Similarly, any argument that the Board cannot lawfully develop "presumptions" that would enable it to adjudicate the "public interest" is likewise flawed, even assuming *arguendo* that the Board's current proposals do in fact establish the "presumptions" ascribed

to them by certain of the railroads' comments.[10] The Board's current published policies, as well as the policies developed through the adjudication of mergers over the past ten years, contain numerous implicit or explicit "presumptions" nowhere mentioned in the statute. These include, for example, the current four-part Board test for the imposition of conditions published at 49 C.F.R. §1180.1(d); the Board's current approach to cumulative impacts and crossover effects published at 49 C.F.R. §1180.1(g); the Board's consistent determination that competition is not significantly lost when there is a reduction from three carriers to two at a particular location; or the agency's current presumption in favor of the "one lump" theory that competition is not adversely affected when one of two competitive upstream carriers merges into a downstream carrier. Indeed, any policy, rule or precedent by its very nature establishes a "presumption" of varying intensity about what an agency will or will not do in future adjudications. Such is the very nature of a policy, rule or precedent. To argue that presumptions as to what constitutes the public interest are not permitted by law is an unsupportable attack on the Board's authority to develop any policies or rules at all.

The argument advanced by CSX, that the Board in enhancing competition, would be using its conditioning power "in the first instance" rather than as a tool to address and correct a problem with the merger, is incorrect because, as discussed above, the Board would be using its conditioning power to address and correct a problem "with the merger," albeit a problem whose geographic locus cannot be precisely identified and whose harm will be difficult to precisely measure. See, CSX Comments, p. 44.

Finally, the fact that Congress, in considering ICCTA, may have been aware that rail carriers were entering a new round of consolidations, and chose not to change the statutory

[10] As set forth further below, the League does not agree that the railroads have correctly characterized the Board's proposed rules as establishing "presumptions" in many of the areas ascribed by the carriers.

"public interest" standard or the processes governing rail consolidation proceedings, does not mean that the legislative body was enshrining the Board's then-current merger policy for all time, or at least until Congress changed the statute. See, BNSF Comments, pp. 29-30. Rather, Congress was clearly satisfied to continue to permit the agency to adjudicate rail consolidations under the broad "public interest" standard, leaving to the agency's determination what constitutes the "public interest" at any particular time. Moreover, the Board's determination that the public interest now requires the enhancement, rather than simply the preservation, of competition, finds strong support in the statute. After all, the very first policy set forth in ICCTA is to "allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail." 49 U.S.C. §10101(1). A rail consolidation policy that would "enhance competition" is four-square within this statutory mandate.

B. There is Abundant Record Support for the Board's Conclusion That Future Rail Mergers Are Likely to Result in Anticompetitive Effects That Will Be Difficult to Remedy Directly or Proportionately

Both the AAR and the large Class I rail carriers argue that the Board has incorrectly presumed that future mergers will bring about anticompetitive effects that are "unremediable"; that there is no "tangible evidence" in the record in this rulemaking to support such a conclusion; and that thus the Board should eliminate or radically revise its fundamental policy change toward "enhancing" competition, and simply adjudicate future mergers as it has in the past, with a "case by case" analysis. AAR Comments, pp. 7, 8-11; see also, CSX Comments, pp. 26-29; UP Comments, p. 12; NS Comments, pp. 21-24; BNSF Comments, pp. 32-34. The rail carriers present a wide variety of arguments in support of their position, the very number and variety of which suggests that the carriers themselves have not definitively concluded what precisely is "wrong" with the Board's approach.

Both the AAR and a number of the carriers first argue that there is no "tangible" evidence in the record in this proceeding that there will be "unremediable" harms. See, *e.g.*, AAR Comments, p. 9; NS Comments, p. 21. But there is substantial testimony at both the ANPR stage, as well as in the initial comments submitted in this proceeding,[11] that past mergers have resulted in a diminution of rail to rail competition, and future mergers are even more likely to result in a lessening of such competition. Indeed, even the KCS, a smaller Class I rail carrier, notes in its initial comments that "it is undeniable that certain past mergers have resulted in a loss of rail-to-rail competition," KCS Comments, at pp. 16-17 (emphasis added). Moreover, particularly given the concentrated nature of the current rail industry and the Board's expertise in rail matters, the Board is clearly entitled to conclude that future rail mergers would likely involve future losses of competition that are "difficult to remedy directly or proportionately."

Moreover, the carriers' arguments do not fairly or precisely characterize the Board's analysis. The Board is not engaged in some generalized presumption about the loss of competition, but is making a rational judgment about the difficulty of identifying precisely the location and effect of the loss of certain forms of competition. The Board's proposed rules identified the loss of geographic competition as one of these losses. It is an instructive example. There are only four major domestic carriers, and the merger of two of these would in all likelihood trigger the merger of the remaining two major domestic carriers, as well as a possible merger of the remaining U.S. carriers with the two existing Canadian carriers, leaving just two carriers in the United States, or perhaps on the North American continent. In such a situation, it will be extremely difficult to identify, before the fact, precisely "where" the loss of geographic competition will occur, and in what markets its effects will be felt.

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[11] See pages 4 to 6 *infra*.

Neither the Board nor the parties have the data nor the analytic tools to make those determinations months or even several years before the effects of such a loss will be realized. Yet the Board is clearly entitled to conclude, under the present conditions in the rail industry, that a loss of such competition is extremely likely, even though its precise locations and effects cannot be determined in advance. In such a case, it is also appropriate for the Board to propose that the merging carriers should compensate for this loss through the "enhancement" of competition in their merged systems.

Beyond the arguments set forth in the AAR's comments and repeated in the comments of a number of the Class I carriers, the specific objections raised by specific Class I carriers also should not be credited. For example, CSX argues that a presumption that mergers harm competition is inconsistent with the analytical framework adopted by other federal agencies, such as the Department of Justice ("DOJ") and the Federal Trade Commission (FTC"), as well as agencies such as the Federal Energy Regulatory Commission and the Federal Communications Commission. CSX Comments, pp. 26-27. This argument is unavailing. DOJ and the FTC deal with mergers in numerous industries, most if not all of which are not nearly as concentrated as the current rail industry. Indeed, in past rail mergers, it has been the applicant carriers that have argued that traditional antitrust standards should not be applied to the railroad industry, a position that the Board has accepted. See, *UP/SP*, decision served August 12, 1996, slip op at 101 ("Our statutory mandate . . . contrasts sharply with the approach to mergers taken by DOJ and the Federal Trade Commission . . . ."). Now, when the Board proposes an approach that would allegedly differ from traditional antitrust treatment to the carriers' detriment, the carriers' argument changes as well. But the carriers cannot have it both ways: traditional antitrust analysis when it suits them, and special

treatment when it does not. CSX's discussion of FERC and FCC precedent is even more astounding: not only do these agencies deal with industries that are less concentrated than the rail industry, but they operate under statutory authority and regulatory policy that emphasizes thoroughgoing "competitive access" of the kind that has been anathema to the railroad industry for years. Clearly, if the same type of competitive access were present in the rail industry as it is in both the electric and gas industry and the communications industry, there would be little need for the Board to consider "enhancing competition" in the context of rail mergers at all.

Additionally, both CSX's and BNSF's assertions that end-to-end mergers do not produce competitive harm is simply wrong on the facts. The League and numerous other parties to this proceeding have detailed how competition has been lost when there is a merger of one of two competitive upstream carriers with a downstream carrier. The Board's proposal for the preservation of major gateways implicitly recognizes this, and several of the Class I carriers themselves endorse the notion that major gateways should be preserved. See, *e.g.,* BNSF Comments, p. 51; UP Comments, p. 13. These Class I carriers' proposals are simply inconsistent with the notion that the merger of end-to-end carriers has no adverse competitive consequences on shippers or other carriers.

C. The Board Is Justified In Concluding That Future Mergers Are Likely to Produce Fewer Efficiencies than Past Mergers

Another argument advanced by the AAR and certain of the major Class I railroads is that the Board should not presume that future mergers will not yield efficiency gains. AAR Comments, pp. 14-15; see also, *e.g.,* NS Comments, pp. 18-21; BNSF Comments, pp. 23-27. The railroads are simply erecting a straw man in place of the Board's well-reasoned and eminently sensible observations.

Clearly, there exists today no potential merger of two major Class I carriers that is not predominantly end-to-end, as long as one assumes that UP would not be permitted to merge with BNSF and that CSX would not be permitted to merge with NS. Thus, the potential merger savings through the elimination of redundant investment are very likely to be limited. Moreover, there is clear support for the proposition that redundant rail investment and excess capacity have also been largely eliminated as a result of the aggressive downsizing that all major carriers have undertaken over the past two decades. The Board's discussion of the potential for possible efficiencies in future mergers clearly does not rule out the possibility that efficiency gains may occur, see proposed 49 C.F.R. §§1180.1(c) and 1180.1(c)(1), the Board is simply making the sensible observation that such gains – "low-hanging fruit" -- are likely to be much more limited in the future. This sensible conclusion is strongly buttressed by the fact that the claimed benefits of past mergers – where the carriers have touted the size of potential merger savings through downsizing or the elimination of excess capacity – have often proved elusive or have been long delayed. Thus, it makes eminent sense for the Board to approach future mergers with a very different expectation of the cost/benefit analysis than it has in the past, and that the agency's merger policy should reflect this changed landscape. The carriers' contentions as to the Board's "presumption" as to efficiency gains in future mergers should be dismissed.

D. There Is Abundant Support for the Board's Conclusion That Future Mergers Might Be Accompanied by Transitional Service Problems

Another argument advanced by the AAR and the major Class I carriers is that the Board should not presume that competitive conditions are necessary to address merger-related service problems. See, AAR Comments, pp. 11-13; see also, NS Comments, pp. 24-28. This criticism is divided into two parts. First, the carriers argue that future merger harms

are not likely to take place because past service problems were "unique," see *e.g.,* AAR Comments, p. 12; and that the Board should not impose permanent competitive conditions because of allegedly temporary service problems.

The Board is clearly entitled to conclude on the basis of the evidence of many past mergers that, despite arguably "unique" aspects of each past merger, service problems are more likely than not to occur. The relatively simple UP/CNW merger was accompanied by a service disruption so severe that UP management had to apologize to its customers for the service failure; the UP/SP merger resulted in a western rail service meltdown that cost shippers billions of dollars and necessitated an emergency service order from the Board; and NS and CSX both had severe service problems integrating Conrail. Even the BNSF/ATSF merger resulted in service disruptions, albeit far less severe than the rest. Thus, out of the last five major mergers, there were mild to absolutely disastrous service problems in four of them. There is nothing in this record that suggests that the service failures that have occurred subsequent to past rail mergers are "unique."

Moreover, even assuming *arguendo* that service failures as a result of mergers are somehow transitory, there is nothing inappropriate in the Board imposing permanent competitive conditions. First of all, as the carriers themselves recognize, the Board in adjudicating rail mergers engages in a balancing test. There is nothing in that test that suggests that a severe, temporary "deficit" (in the form of a risk of severe service failure) cannot be balanced against a permanent "benefit" (in the form of increased competition).

In addition, it is not at all clear that the service problems that have been experienced as a result of past mergers have simply disappeared. Just last month, the League surveyed the members of its Rail Transportation Committee to determine its members' experience with

rail service. That survey mirrored one that the League conducted one year ago. This recent survey, whose results are attached to these comments as Appendix A, is instructive. The survey results show, for example, that while the service problems on NS and CSX have clearly abated, approximately three quarters of shippers on those lines are reporting that service still has not reached pre-split levels. One quarter of respondants reported that service over the merged UP was still not as good as over the pre-merger UP and SP. Only shippers over BNSF reported rail service as good or better than they experienced prior to that merger, and just a small proportion of CN and IC shippers reported they were experiencing worse service pre-merger compared to post merger service.

Finally, and probably most importantly, the League strongly believes that increased competition itself will lead to fewer service failures and improved service. Thus, imposition of conditions that would enhance competition would help to insure that service problems will not occur immediately after the merger (because the offending carrier would find its business being taken either temporarily or permanently by its competitor) and will reduce the chances of their occurring in the future.

E. The Board Should Not, as Suggested by Some of the Major Carriers, Dilute the Force of Its Requirement for Service Assurance Plans

AAR's comments and those of a number of the major Class I rail carriers asked the Board to provide for "flexibility" in the implementation of service assurance plans. See, AAR Comments, p. 21; see also, *e.g.,* CSX Comments, pp. 50-57. While the League has no desire to lock carriers into a service plan that makes no sense in the light of changed conditions, the flavor of these comments suggest that the carriers would be looking at the service plans as mere "goals" or "statements of good intention," to be discarded if the carriers believe necessary. The League strongly believes that they should not be so treated,

particularly in six to twelve months immediately after the merger when the risk of service failure appears to be greatest. Moreover, as noted above, the carriers service assurance plans should contain enforceable penalties for service failures, with expedited arbitration of disputes, for approximately one year after the proposed merger is implemented. See, NITL Comments, pp. 21-22.

III. CONCLUSION

The League respectfully requests the Board to modify its proposed rules in the manner suggested by the League in its November 17 comments. The thrust of the League's comments are supported by many parties to this proceeding, and the only parties uniformly opposed to the thrust of the Board's proposals and the direction of the League's comments – the major Class I rail carriers – have failed to show that the direction of the agency's proposals is incorrect either as a matter of law, is unsupported by the record in this case, or is inadvisable as a matter of sound transportation policy.

Respectfully submitted,

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THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

RESULTS FROM NOVEMBER 2000 RAIL MERGER SURVEY

In December 1999, the League surveyed its members regarding the state of railroad service at that time, compared to service before the major mergers that have taken place in the railroad industry since late 1995. The League is interested in updating that survey, to see what is the current state of affairs regarding rail service. In October 2000, the League sent an updated survey to its members, with instructions for return of the survey in November. **178** surveys were distributed, and **32** were returned. A summary of the survey results follows.

PART I– INFORMATION ON RAIL SERVICE

A. NORFOLK SOUTHERN/CSX RAIL SERVICE

The following questions were answered by League members who currently utilize NS and/or CSX for part or all of their rail service. Of the total number of responses received, **94%**, or **30** respondees, reported that they used **NS** rail service, and **94%**, or **30** respondees, reported that they used **CSX** rail service. The answers of the respondees who use either NS and/or CSX rail service follow.

1. Select the term that describes your service on the named carrier from July 1, 2000 to date:

Of those using NS and/or CSX, the following percentages for each answer were reported:

NS:	**0%**	**Excellent**	**CSX:**	**0%**	**Excellent**
	27%	**Good**		**35%**	**Good**
	70%	**Fair**		**53%**	**Fair**
	8%	**Poor**		**19%**	**Poor**

2. Is your service since July 1, 2000 the same, better or worse compared to your service before June 1, 1999 (i.e., before the Conrail "Split Date"), including service on the former Conrail)?:

Of those using NS and/or CSX, the following percentages for each answer were reported:

NS:	**15%**	**Better than before June 1, 1999**	**CSX:**	**15%**	**Better than before June 1, 1999**
	12%	**Same as before June 1, 1999**		**17%**	**Same as before June 1, 1999**
	77%	**Worse than before June 1, 1999**		**70%**	**Worse than before June 1, 1999**

3. If you have encountered service problems since July 1, 2000 please check as many as apply, by placing a "1" or a "2" in the space indicated, depending upon whether the problem is moderate ("1") or severe ("2"):

93%, or 28 respondents using NS and/or CSX responded to this question. Of those responding to the question:

NS:	**86%**	**Lost/delayed shipments** 71% moderate 29% severe	**CSX:**	**89%**	**Lost/delayed shipments** 76% moderate 24% severe
	11%	**Inadequate car supply** 100% moderate		**18%**	**Inadequate car supply** 80% moderate 20% severe
	46%	**Data/EDP problems** 64% moderate 36% severe		**42%**	**Data/EDP problems** 50% moderate 50% severe
	69%	**Poor customer communications** 68% moderate 32% severe		**64%**	**Poor customer communications** 50% moderate 50% severe
	8%	**Other** moderate delays at Decatur, IL; severe pricing and contract issues		**8%**	**Other** moderate delays at ESTL; severe pricing and contract issues

4. If your service problems are particularly severe in one or more areas, cities, or terminals/yards, specify those locations:

On NS: **44 terminals were listed. Of these 21 were listed once. Most frequently named were Cleveland, OH, Buffalo, NY, Conway, PA, Eastern, PA, New Jersey, Roanoke, VA, and Atlanta, GA.**

On CSX: **45 terminals were listed. Of these 22 were listed once. Most frequently named were New Jersey, Atlanta, GA, Ohio, and Philadelphia, PA.**

5. As a result of any service problems that you have had since July 1, 2000 have you experienced any of the following?

83%, or 25 respondents using NS and/or CSX responded to this question. Of those responding to the question:

72%	**Used truck at a higher transportation cost**
32%	**Incurred increased storage charges**
60%	**Incurred increased charges or costs for railcars**
12%	**Curtailment of your plant operations**
4%	**Shutdown at your plants**
40%	**Curtailment of customer's operations**
12%	**Customer plant shutdown**
8%	**Other**

6. If you have experienced service problems on either NS or CSX since July 1, 2000, please give an estimate as to the damages or amount of money that your company has lost as a result of these service problems.

37%, or 11 respondents using NS and/or CSX answered this question. The average estimate of damages was $1 million.

7. If your company has suffered damages or monetary losses since June 1, 1999 (Split Date) as a result of service problems on NS or CSX, please check as many as apply:

63%, or 19 respondents using NS and/or CSX responded to this question. Of those responding to the question:

74% My company has filed a claim or claims with NS, but it/they has/have not been resolved
42% My company has filed a claim or claims with CSX but it/they has/have not been resolved
26% My company has resolved all of its claims with NS
42% My company has resolved all of its claims with CSX

8. Compared to the rates charged during the last quarter of 1998 for service on NS or CSX, in general are your rates as of October 25, 2000 (i.e. including the recent fuel surcharges):

90%, or 27 respondents using NS, and 87%, or 26 respondents using CSX responded to this question. Of those responding to the question:

On NS: 74% said "higher than they were then" by about 6.3%
15% said "remained about the same"
11% said "lower than they were then" by about 7.7%

On CSX: 77% said "higher than they were then" by about 6.8%
15% said "remained about the same"
8% said "lower than they were then" by about 5%

B. UNION PACIFIC RAIL SERVICE

The following questions were answered by League members who currently utilize UP for part or all of their rail service. Of the total number of responses received, **97%**, or **31** respondees, reported that they used **UP** rail service. The answers of the respondees who use UP rail service follow.

1. Select the term that describes your service on the merged UP from July 1, 2000 to date:

Of those using UP, the following percentages for each answer were reported:

0% Excellent
68% Good
26% Fair
6% Poor

2. This questions asks you about service on the former UP and the former SP in the period just before their merger in 1996, compared to now. Check the box or boxes that apply:

a) In the first half of 1996 (immediately before the UP and SP merger was approved), I utilized rail service on the form UP. Compared to then, service on the merged UP is now:

Of the 28 respondees that used UP, the following percentages for each answer were reported:

29%	**Better**
50%	**About the same**
21%	**Worse**

b) In the first half of 1996 (immediately before the UP and SP merger was approved), I utilized rail service on the former SP. Compared to then, service on the merged UP is now:

Of the 27 respondees that used SP, the following percentages for each answer were reported:

52%	**Better**
22%	**About the same**
26%	**Worse**

3. Compared to the rates charged during first half of 1996 on either UP or SP, in general are your rates on the merged UP now:

84%, or 26 respondents using UP responded to this question. Of those responding to the question:

81%	**said "higher than they were then" by about 9.5%**
15%	**said "remained about the same"**
4%	**said "lower than they were then" by about N/A** (numbers were not provided)

C. BNSF RAIL SERVICE

The following questions were answered by League members who currently utilize BNSF for part or all of their rail service. Of the total number of responses received, **88%**, or **28** respondees, reported that they used **BNSF** rail service. The answers of the respondees who use BNSF rail service follow.

1. Select the term that describes your service on the merged BNSF from July 1, 2000 to date:

Of those using BNSF, the following percentages for each answer were reported:

11%	**Excellent**
75%	**Good**
14%	**Fair**
0%	**Poor**

2. This question asks you about service on the former BN and the former ATSF in the period just before their merger in 1995, compared to now. Check the box or boxes that apply:

a) In the first half of 1995 (immediately before the BN and ATSF merger was approved), I utilized rail service on the former BN. Compared to then, service on the merged BNSF is now:

Of the 26 respondees that used BN, the following percentages for each answer were reported:

27%	**Better**
73%	**About the same**
0%	**Worse**

b) In the first half of 1995 (immediately before the BN and ATSF merger was approved), I utilized rail service on the former ATSF. Compared to then, service on the merged BNSF is now:

Of the 24 respondees that used ATSF, the following percentages for each answer were reported:

25%	**Better**
71%	**About the same**
4%	**Worse**

3. Compared to the rates charged during the first half of 1995 on either BN or ATSF, in general are your rates on the merged BNSF now:

82%, or 23 respondents using BNSF responded to this question. Of those responding to the question:

65%	**said "higher than they were then" by about 9.5%**
17%	**said "remained about the same"**
17%	**said "lower than they were then" by about 5%**

D. CN-IC RAIL SERVICE

The following questions were answered by League members who currently utilize CN-IC for part or all of their rail service. Of the total number of responses received, **78%**, or **25** respondees, reported that they used **CN-IC** rail service. The answers of the respondees who use either CN-IC rail service follow.

1. Select the term that describes your service on the merged CN-IC from July 1, 2000 to date:

Of those using CN/IC, the following percentages for each answer were reported:

12%	**Excellent**
68%	**Good**
16%	**Fair**
4%	**Poor**

2. This question asks you about service on the former CN and the form IC in the period just before their merger in 1999, compared to now.

a) In the first half of 1999 (immediately before the CN and IC merger was approved), I utilized rail service on the former CN. Compared to then, service on the merged CN-IC is now:

Of the 22 respondees that used CN, the following percentages for each answer were reported:

5%	**Better**
86%	**About the same**
9%	**Worse**

b) In the first half of 1999 (immediately before the CN and IC merger was approved), I utilized rail service on the former IC. Compared to then, service on the merged CN-IC is now:

Of the 22 respondees that used IC, the following percentages for each answer were reported:

5%	**Better**
77%	**About the same**
18%	**Worse**

3. Compared to the rates charged during the first half of 1999 on either IC or CN, in general are your rates on the merged IC-CN now:

100%, or 25 respondents using CN-IC responded to this question. Of those responding to the question:

44% **said "higher than they were then" by about 5%**
12% **said "remained about the same"**
32% **said "lower than they were then" by about N/A** (numbers were not provided)

PART II – INFOMRATION ON RAIL TRANSIT TIMES

Part II of the League's survey asked Railroad Transportation Committee members about current transit times in the month prior to the railroad's merger, compared to transit times in the same month of 2000. Members were asked to select five origin-destination pairs on which they used rail service before the merger, and on which they still used rail service today, and that they believed were representative of service over the merged carrier today. A representative movement was not to be a minor, one-time, or sporadic movement. Respondents were asked to specify particular origin-destination pairs, and record their average transit time in days between the origin and destination during the two time periods.

A. Norfolk Southern Rail Transit Times

15 NITL Rail Committee members shipping over NS responded to this part of the survey.

The data showed that the average transit time for the 64 reported movements increased 20% between October 1998 and October 2000, from 7.9 days on average to 9.5 days on average.

B. CSX Rail Transit Times

16 NITL Rail Committee members shipping over CSX responded to this part of the survey.

The data showed that the average transit time for the 61 reported movements increased 6% between October 1998 and October 2000, from 7.5 days on average to 8.0 days on average.

C. Union Pacific Rail Transit Times

8 NITL Rail Committee members shipping over UP responded to this part of the survey.

The data showed that the average transit time for the 25 reported movements increased 6% between June 1996 and June 2000, from 8.8 days on average to 9.3 days on average.

D. BNSF Rail Transit Times

6 NITL Rail Committee members shipping over BNSF responded to this part of the survey.

The data showed that the average transit time for the 22 reported movements remained the same between June 1995 and June 2000, from 8.2 days on average to 8.2 days on average.

E. CN-IC Rail Transit Times

6 NITL Rail Committee members shipping over CN-IC responded to this part of the survey.

The data showed that the average transit time for the 19 reported movements decreased 6% between June 1999 and June 2000, from 8.7 days on average to 8.2 days on average.

Certificate of Service

I hereby certify that I have on this 18th day of December served the foregoing Reply Comments on the parties of record in this proceeding, by first class mail, in accordance with the Board's order in this case and the agency's Rules of Practice.